Supreme Court, U.S.
FILED
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NO.

IN THE

Supreme Court of the United States

ROBERT FITZPATRICK,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: March 12, 2005

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

I. IF SERIOUS PUBLIC CORRUPTION IS AN UNACCEPTABLE DISESTABLISHMENT OF THE RULE OF LAW, THEN IS IT A PRIMARY DUTY OF THE COURTS TO ASSIST MILITANTLY IN THE POLICING OF SAME?

II. IF SO, WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ABNEGATED ITS PRIMARY DUTY IN NOT ADOPTING PETITIONER'S ARGUMENT THAT:

> WHEN CREDIBLE *PRIMA FACIE* EVIDENCE OF SERIOUS PUBLIC CORRUPTION IS PRESENTED TO A FEDERAL TRIBUNAL, ANY AMBIGUITY WITH RESPECT TO THE JUSTICIABILITY OF THE MATTER SHOULD BE RESOLVED, AND ALL REASONABLE INFERENCES DRAWN, IN FAVOR OF EDUCING SAID EVIDENCE.

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OPINION BELOW

The matter first came to the U.S. Court of Appeals for the Federal Circuit in 2000 on an appeal of a Merit Systems Protection Board (MSPB) decision upholding the Interim Decision of an Administrative Judge ("AJ") that Fitzpatrick's Petition for Enforcement of a 1986 Settlement Agreement was not timely filed.

The Court reversed and remanded with instructions to "address whether the settlement agreement was or is being violated and, if so, what remedy may be appropriate." (A. 6a, - unpublished decision available at 2001 WL 1313663 (Fed.Cir.)

Without hearing, the AJ ruled that there was no breach of the Settlement Agreement and, if there was, it was not material. (Initial Decision, A. 11a-28a.) The MSPB affirmed. (A. 29a.)

The Court of Appeals heard the case upon oral argument in Los Angeles and affirmed the MSPB by entry of Judgment without opinion. (A. 7a.) Accordingly, the basic argument in this Petition has not been addressed.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the U.S. Court of Appeals for the Federal Circuit was entered December 16, 2004.

STATEMENT OF THE CASE

This matter manifests itself before the court as a contract case. The specific issues are whether a certain 1986 Settlement Agreement of a Merit Systems Protection Board (MSPB) matter was breached by the agency (the FBI) and, if so, whether the breach was material.

The background and facts of the underlying matter, as alleged by Fitzpatrick in his factually undisputed brief are at A. 21a-25a; and Fitzpatrick's polygraphically supported Verified Offer of Proof is at A. 39a-54a. They can be summarized briefly as follows:

> Fitzpatrick was a 21-year veteran of the FBI who in 1985 had risen to the rank of GM-15 and the position of Assistant Special Agent in Charge ("ASAC") of the Boston bureau. In 1985, he received credible information that his superior, the Special Agent in Charge ("SAC") of the Boston bureau had leaked grand jury information to a criminal defense lawyer regarding the identity of an informant. Said informant had subsequently disappeared [and is now known to have been murdered].
>
> After receiving this information concerning the SAC, Fitzpatrick contacted the office of the Director of the FBI orally and in writing to report same. Fitzpatrick was never subsequently contacted by the FBI Office of Professional Responsibility or anyone from

the Director's office regarding the leaked information he transmitted.

Subsequent to Fitzpatrick's notification of the reported leak, the SAC in question filed a complaint against Fitzpatrick regarding Fitzpatrick's investigation of an incident on Cape Cod where an agent had fired his gun during a drug apprehension. Besides disputing the substantive allegations, Fitzpatrick maintains that the SAC had ordered Fitzpatrick to conduct an investigation in violation of FBI rules and regulations; the charges complained of were rarely invoked; and but for Fitzpatrick's reporting of the SAC, the complaint would not have been filed. (See Verified Offer of Proof, ¶'s 7a-c, A. 41a.)

As a result of the SAC's complaint, Fitzpatrick was removed as ASAC and demoted two full grades. The SAC in question subsequently told Fitzpatrick that the complaint the SAC had filed against him could be mitigated if Fitzpatrick dropped the complaint against the SAC. (Polygraph Report, A. 52a-53a.) Fitzpatrick refused to alter his position and appealed to the MSPB.

In difficult circumstances for Fitzpatrick, the case was settled pursuant to a written settlement agreement, accurately quoted in the AJ's decision at A. 13a-15a. Notably, there were both non-disclosure and a personnel-file purging clauses ("2" and "9"). The reduction in grade was retained, and the

agreement also called for Fitzpatrick's transfer to the Providence, RI, office in September, 1986. He was guaranteed that he would not be transferred before eligibility for early retirement, about 3½ years later. However, in December, 1986, he resigned, partly because of, *inter alia*, "circumstances caused by the Boston SAC's retaliation," (Verified Offer of Proof, ¶ 12, A.41a) as well as corruption in the Providence office (as noted in the AJ's decision at A. 26a-28a).

After his separation from the FBI, Fitzpatrick became a licensed private investigator, often working for defense counsel at the federal bar. The filing of the MSPB case at bar was precipitated by information received by Fitzpatrick in 1997, over a decade later, that the prosecution was threatening to impeach him with information from his Official Personnel File ("OPF") in a U.S. District Court criminal sentencing proceeding in Boston in which Fitzpatrick was to testify for the defense. Further investigation by Fitzpatrick led him to believe that his OPF still contained information forbidden by the MSPB settlement agreement. He filed a complaint with the Justice Department Office of Professional Responsibility and attempted to clarify the facts by communication with the Director of the FBI. When this failed, he filed a pro se pleading with the MSPB, which was later taken over by this counsel.

The AJ ruled that Fitzpatrick's MSPB petition was untimely and the Board affirmed. On remand, after reversal by the Court of Appeals, the AJ, without hearing, ruled that: (1) there was no breach of the agreement (despite an agency admission that there were documents "in need of purging" in his OPF and the fact that the FBI's admitted post-filing manipulation of the file so as to make it impossible to determine what materials had not been purged; and (2) that even if there were a breach, it was not material because any purging was not intended to protect Fitzpatrick's future employment prospects. The Board affirmed.

Fitzpatrick appealed once again to the Court of Appeals, arguing that: (1) there was clear *prima facie* evidence of breach, which shifted the burden of proof; (2) because the actions of the agency in any event deprived him of the opportunity to prove the breach, it should be estopped from asserting there was one; (3) the breach was material if for no other reason than the purging provision was the *only valid consideration* he received under the agreement; and (4) that the Court should in any event take advantage of the opportunity to enunciate the "corruption case" rule this Petition advocates. (Summary of Argument of Brief, A. 37a-38a). Without decision, the Court of Appeals affirmed the Board.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Case is an Excellent Vehicle for Taking a Moderate Yet Powerful Step to Combat Corruption.

If the court agrees that corruption is the disestablishment of the rule of law and highly corrosive to democracy, then it follows that the courts should take every reasonable opportunity to help combat it. The Supreme Court is best situated to do so.

It is respectfully suggested that this case provides a very well-constituted vehicle for the formulation of a measured and moderate "sunlight" evidentiary doctrine in cases involving corruption, with appropriate safeguards that promises significant salutary effects.

B. The Suggested Public Policy Doctrine Will Help Reach Interstitial Situations Otherwise Difficult To Police or Even Know About.

More than merely being in accord with the public policy favoring so-called "whistle blowing," the doctrine will also smooth practical court room obstacles to its effectuation, as well as covering interstitial situations involving significant corruption, which somehow now fall between legal stools.

In this latter regard, for example, (but without, of course, any representations regarding the case at

bar), there is the delicate topic of whether the reach of corruption could from time to time extend to the administrative judiciary. The enormous legal deference accorded to the administrative judiciary's findings of fact and its drawing of inferences, combined with the decisive role of these findings in any legal proceeding, makes administrative adjudication a particularly vulnerable chokepoint to stifle inquiry into corruption in the agencies or elsewhere in administrative branch. Certainly, fears of this happening cannot be deemed totally fanciful when police/intelligence agencies come under scrutiny for corruption. This matter presents the Court with a singular opportunity to provide responsibly structured insurance against such discomforting possibilities.

C. The Court Should Encourage Actors in the "Marketplace" of Corruption Fighting.

Finally, to the extent morale is important, there is the issue of providing some encouragement to members of the bar and other individual actors who commit against corruption. The endeavor is hardly a high-profit item. A concrete sign that the high court views the duty to combat corruption as a significant enough priority to address would be salutary in this regard, particularly if the Court makes the process simpler.

D. Applying the Rule to the Instant Matter Demonstrates Its Simplicity and Efficacy.

The manner in which the proposed rule would be applied in corruption cases is straightforwardly illustrated by the contrast between the administrative judge's rulings on the two contract issues — breach and materiality — as opposed to the result which would ensue under the proposed corruption-case rule.

Existence of Breach: Fitzpatrick's assertion of breach of the settlement agreement's purging provision relied mainly upon a footnote in the agency's September 23, 1999 brief which stated:

> In a review of appellant's O[fficial] P[ersonnel F[ile], and several documents from the MSPB hearing in 1986 had been misfiled in the record and in need of removal. The record is currently under review for purging of those materials.

(A. 55a, fn.1).

The AJ admitted that such documents "could have violated the agreement." (Interim Decision, A.22a.) However, "despite steps taken to identify the documents, the agency was unable to obtain copies of them." (A. 22a.) In other words, it was impossible to determine what documents "in need of removal" the agency itself purged from the files after Fitzpatrick's petition was filed.

Nevertheless, the AJ noted that the "current copy of the appellant's OPF submitted in response to the Board's remand order [in 2002] contains no misfiled documents that would violate the settlement agreement." (A. 22a). On that basis, the AJ wrote that "Because there is no evidence of what documents from the MSPB hearing were found in appellant's OPF, there is no basis for a conclusion that they referred to the cancel adverse action in violation of the agreement." *Id.*

It may or may not be as odd to the court as it is to petitioner how a reasonable mind could conclude that:

(1) documents which the agency admitted were "in need of removal" provides "no basis" to conclude it is more probable than not, or at least a *prima facie* case exists, these documents were in need of removal because they violated the agreement that called for their removal; and

(2) that because their irretrievability is the direct result of the agency's unreconstructable scrambling of the file during the pendency of the action, Fitzpatrick has been unfairly deprived of his ability to prove the breach, which would estop the agency from asserting the defense that there was no breach. Even more fundamentally, if the admission can reasonably be said to constitute *prima facie* evidence of breach, the burden shifts to the agency to show there was no brief. *Herring* v. *Department of the Navy*, 90 M.S.P.R. 165, 168 (2001).

In any event, if the proposed "sunlight" evidentiary standard were applied, Fitzpatrick's

burden on the issue would have been satisfied by demonstrating that a reasonable inference of breach *could be drawn* from the agency admission, which petitioner suggests is in fact the overwhelming inference here.

Materiality of Breach: in ruling that any breach of the settlement agreement purging provisions was not material, the AJ applied a purpose analysis. She concluded that "the goal of the appellant's settlement agreement could not have been to purged adverse information from the records that might affect future employment prospects because the appellant remained in agency employ and because the agreement specifically allowed the agency to retain notice of proposed reduction in grade describing the charges against the appellant." (A. 25a.) (Emphasis supplied.) Rather, it was "more likely that the goal of the agreement when it was reached was to minimize the damage to the appellant's agency career that a record of an adverse action would have caused and allow him to start all over in a location he preferred." *Id.*

Unlike the striking level of oddness of the materiality ruling, this is not a *prima facie* unreasonable inference.

However, a reasonable contrary inference can also be drawn. After all, if nothing else, the two goals — protection of government employment and protection of future employment prospects — are not mutually exclusive.

Secondly, the fact that the agreement specifically referred to the date of Fitzpatrick's eligibility for early retirement — then just 3½ years away — and dissolved his protection against involuntary transfer at that point is certainly some indication that his separation from the FBI in the relatively near future was contemplated at the time of the agreement. Someone, after all, calculated it and used it as a benchmark. Is it a reasonable interpretation of the agreement that the purged material was allowed to be re-inserted into his file at that time?

Finally, the notion that Fitzpatrick's career in a paramilitary police and intelligence agency was anything but totally destroyed by his reporting of the relatively high-ranking superior seems unrealistic, particularly when there appears to have been no investigation whatsoever by the FBI Office of Professional Responsibility of Fitzpatrick's report. Fitzpatrick was not starting a career over, he was ending it according to a strongly implied schedule.

Thus, the oddness needle rises again with the AJ's assertion that "I do not find it reasonable to believe that protection of future employment prospects and his reputation in general was a specific goal of the settlement agreement." (A. 25a, fn. 5).

In any event, the AJ's determination would be reversed if the corruption-case standard governed. On appeal, Fitzpatrick's burden would be to show that a reasonable inference *also* could be drawn that protection of future employment prospects was also a goal of the settlement agreement. Counsel

respectfully suggests that the simple analysis above would amply suffice to sustain that burden.

Then, under contract law Fitzpatrick could take advantage of his contract remedy for breach to have his original claim go forward. There would be a justiciable case. And pursuant to the corruption-case rule, the circumstances of any informant-identity leaks or Office of Professional Responsibility malfeasance would have to be allowed into the record, as Fitzpatrick pursued his underlying retaliation claim. Rare sunlight would penetrate dark corners very much in need of same and which the AJ and MSPB would not otherwise allow it to receive.

E. There Is Precedent For Establishing Special Eased Rules in Special Categories of Cases to Accomplish Supervening Goals.

The law is not without precedent in adopting special rules of inference-drawing and mandates to proceed when totally unacceptable situations come before the bar and which might otherwise be deemed to fail the requirements of justiciability.

As early as 1911, the Supreme Judicial Court of Massachusetts confronted the issue of how to deal with the situation where one party to a transaction accepts consideration, fails to perform, *and* retains the consideration, but has a traditional contractual defenses (usually involving indefiniteness) which would otherwise defeat recovery. Confronting a situation where plaintiffs were induced to withdraw

their claims in a will contest by a promise to "make it right," the court enforced the contract and promulgated a rule that:

> [w]hen a contract has been executed on one side, the law will not permit the injustice of the other party retaining the benefit without paying unless compelled by some inexorable rule.

Silver v. *Graves*, 210 Mass. 26, 30, 95 N.E. 948, 949 (1911).

In addition to enforcing a contract to "make it right," the doctrine of *Silver* v. *Graves* has been invoked, for example, to enforce an oral promise to a performing plaintiff that he "would be taken care of" *Fenton* v. *Federal St. Bldg. Trust*, 310 Mass. 609, 613, 39 N.E.2d 414, 416 (1942). In a 1956 *Silver* situation, the Court found that an oral agreement "to increase wages if business should improve did not fail for indefiniteness." *Delorafano* v. *Delorafano*, 333 Mass. 684, 687, 132 N.E.2d. 668, 671 (1956).

These cases are not cited for direct applicability to the instant situation, but rather as a strong example of a careful and responsible Supreme Court significantly changing rules of interpretation and inference-drawing to help the practical accomplishment of a superveningly important goal. The suggested "corruption-case" rule is actually a much milder adjustment directed at a much higher priority problem.

CONCLUSION

If the Court deems facilitating the never-ending struggle against corruption important, in terms of primary duty or otherwise, it should, without deferral, address the issue by granting this petition so that the suggested corruption case rule can be evaluated by the best legal minds with any appropriate modifications or refinements. Then the Court should:

1. Enunciate a "sunlight" rule that all reasonable inferences should be made in favor of adducing evidence of serious governmental corruption in determining the justiciability of the matter at bar (or an appropriate modification thereof);

2. On that basis reverse the affirmation of the Merit Systems Protection Board by the U.S. Court of Federal Appeals; and

3. Remand the matter so as to grant Fitzpatrick his right to proceed in the MSPB with his contract remedies in accordance with the proposed rule.

Respectfully submitted,
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By His Attorney

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Dated: March 12, 2005

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APPENDIX A

NOTICE: THIS IS AN UNPUBLISHED OPINION. Use FI CTAF Rule 47.6 for rules regarding the citation of unpublished opinions.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

United States Court of Appeals, Federal Circuit.

Robert FITZPATRICK, Petitioner,
v.
DEPARTMENT OF JUSTICE, Respondent.

No. 00-3385.

Oct. 19, 2001.

Before MAYER, Chief Judge, Newman, and Bryson, Circuit Judges.

Bryson, Circuit Judge.

•1 Robert Fitzpatrick appeals from the final decision of the Merit Systems Protection Board, which dismissed his petition for enforcement of a 1986 settlement agreement as untimely because it was not filed within a reasonable time after he learned of the alleged breach of the agreement. We conclude that Mr. Fitzpatrick pursued a reasonable course of action after he first received information suggesting that there may have been a breach of the settlement agreement. For that reason, we conclude that he did not unreasonably delay filing his petition for enforcement. We

therefore *vacate* the decision of the Board dismissing his petition and *remand* for further proceedings.

I.

In May 1986, Mr. Fitzpatrick was removed from the position of Assistant Special Agent in Charge of the FBI field office in Boston. His removal from that position was accompanied by a reduction in grade. Mr. Fitzpatrick subsequently appealed the demotion to the Merit Systems Protection Board. That appeal was resolved through a settlement agreement with the FBI, which provided that: (1) the FBI would cancel the adverse personnel action; (2) the FBI would remove from Mr. Fitzpatrick's official personnel file all references to the adverse action except for the letter proposing the action; (3) Mr. Fitzpatrick would submit a letter requesting a reduction in grade and an official transfer from the Boston office to the FBI's office in Providence, Rhode Island; (4) the FBI would place in Mr. Fitzpatrick's official personnel file a copy of the request letter along with a form reducing his grade, but stating the reason for the action as "Employee's Request for Voluntary Downgrade for Personal Reasons", and (5) the parties would avoid any nonessential disclosure of the terms of the agreement. Following the transfer and reduction in grade, Mr. Fitzpatrick resigned from the FBI later that year.

In September 1997, while serving as a private investigator for a criminal defense attorney in connection with a federal prosecution, Mr. Fitzpatrick received information that suggested to him that the 1986 settlement agreement may have been violated. In particular, Mr. Fitzpatrick

heard from the defense attorney that an Assistant United States Attorney who was prosecuting the case had suggested that he had access to Mr. Fitzpatrick's personnel file and that it contained derogatory information that could be used to impeach Mr. Fitzpatrick if he testified as an expert witness. After being told of that conversation by the defense attorney, Mr. Fitzpatrick reported the matter to the United States Attorney's office and requested an inquiry. His letter and other relevant correspondence were forwarded to the Department of Justice's Office of Professional Responsibility ("OPR"). OPR conducted an inquiry into the matter and ultimately determined that the Assistant United States Attorney had not committed misconduct. When Mr. Fitzpatrick learned of that decision, he inquired as to whether he could appeal from that determination. OPR informed him by letter that there was no procedure for a complainant to challenge its findings. That letter, dated June 10, 1999, made reference to Mr. Fitzpatrick's "demotion and ultimate departure from the FBI."

*2 On July 9, 1999, Mr. Fitzpatrick wrote a letter to the Director of the FBI expressing concerns about the disclosure of information from his personnel file and requesting a copy of his file. When he received no response to that inquiry, he filed a petition for enforcement of the settlement agreement with the Board on August 13, 1999. In his petition, he alleged that the FBI had violated the settlement agreement by failing to remove records that were supposed to have been removed from his official personnel file.

After receiving briefing on the question whether the petition was timely, the administrative judge dismissed Mr. Fitzpatrick's petition on the ground that it had not been filed within a reasonable time. The administrative judge reasoned that Mr. Fitzpatrick had been aware of the agency's alleged noncompliance in 1997, approximately two years before he filed his petition with the Board. The administrative judge also found that the June 10, 1999, letter was consistent with the terms of the settlement agreement and therefore provided no new information concerning the agency's alleged noncompliance with the agreement. After the full Board denied Mr. Fitzpatrick's petition for review, he sought review by this court.

II.

Ordinarily, a petition for enforcement of a final decision of the Merit Systems Protection Board must be filed within 30 days after the agency serves its notice of compliance with the decision. Any petition filed after that time must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing the petition. Because an agency that enters into a settlement agreement is not required to serve a notice of compliance, there is no strict time limit on filing a petition for enforcement of a settlement agreement; instead, the Board has held that such a petition must be filed within a reasonable time of the date of the alleged breach of the agreement. The reasonableness of the time period depends on when the petitioning party learned of the alleged breach and the particular circumstances of the case. *Id.*

The administrative judge in this case concluded that Mr. Fitzpatrick "was aware of the agency's alleged noncompliance approximately two years before he filed the petition for enforcement" and for that reason concluded that the delay of two years in filing the petition for enforcement was unreasonable. We disagree with the administrative judge's ruling. Although it is true that Mr. Fitzpatrick had information in 1997 that led him to suspect that the settlement agreement may have been breached, he did not have conclusive evidence of a violation. Indeed, the government acknowledged as much at oral argument, pointing out that Mr. Fitzpatrick's suspicion was based only on "second- or third-hand hearsay." Thus, we do not agree with the apparent conclusion of the administrative judge that Mr. Fitzpatrick had notice of a violation of the settlement agreement in September 1997. Nor do we agree with the government's suggestion that the time for filing a petition for enforcement ran from the time Mr. Fitzpatrick first had reason to suspect that the government may have breached the settlement agreement. Instead, it was reasonable for him to take other steps to attempt to confirm that a violation had occurred before filing a petition for enforcement. Although the course of action he pursued—raising the issue with the United States Attorney's office, which referred the matter to the Department of Justice's Office of Professional Responsibility—may not have been the most effective course to follow, it was a step that was reasonably designed to determine whether there had been an improper disclosure of matters that should not have been contained in his personnel file. When that inquiry neither confirmed his suspicions nor

allayed his concerns, he sought confirmation by another means—requesting a copy of his personnel file from the FBI—but he received no satisfactory response to that request either. Shortly after requesting a copy of his personnel file and receiving no response, he filed his petition for enforcement.

*3 If it had been clear in 1997 that the settlement agreement had been violated, it would have been reasonable for the Board to conclude that a two-year delay in filing the petition for enforcement rendered the petition untimely. In light of the fact that the evidence of a breach of the agreement that Mr. Fitzpatrick had in 1997 was inconclusive, however, he acted reasonably in taking measures designed to confirm his suspicions before filing a petition for enforcement. Mr. Fitzpatrick filed his petition within a reasonable period after it became clear that neither the OPR investigation nor Mr. Fitzpatrick's request for access to his official personnel file was going to give him the means to determine for sure whether there had been a violation of the settlement agreement. Under those circumstances, we conclude that the Board abused its discretion by concluding that Mr. Fitzpatrick should have filed his petition for enforcement at some earlier point in the process and that the petition he filed in August 1999 was untimely. We therefore remand the case for the Board to address whether the settlement agreement was or is being violated, and if so, what remedy may be appropriate.

APPENDIX B

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals
for the Federal Circuit

FILED
U.S. COURT OF APPEAL FOR
THE FEDERAL CIRCUIT
DEC 16 2004
JAN HORBALY
CLERK

04-3015

ROBERT FITZPATRICK,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Judgment

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD
In CASE NO(S). BN0752860169-B-1 and BN0752860169-M-1
This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED:
Per Curiam (MAYER, Chief Judge, MICHEL and LINN, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

/s/
Jan Horbaly, Clerk

DATED DEC 16 2004

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT WITHOUT OPINION

JUDGMENT ENTERED: 12/16/04

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Petitioner(s) in favor of the Respondent(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded its costs. If costs are awarded against the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties'

written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

/s/
JAN HORBALY
Clerk

cc: A. DOUGLAS MATTHEWS
STEVEN J. ABELSON

FITZPATRICK V JUSTICE, 04-3015
MSPB BOARD – BN0752860169-B-1

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBERS
BN-0752-86-0169-B-1
BN-0752-86-0169-M-1

ROBERT FITZPATRICK,

Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: August 6, 2002

A. Douglas Matthews, Esquire, Fall River, Massachusetts, for the appellant.

Mindy A. Kaiden, Esquire, Washington, D.C., for the agency.

BEFORE
Elizabeth B. Bogle
Administrative Judge

INITIAL DECISION

The appellant filed two petitions for enforcement alleging that the Federal Bureau of Investigations (FBI or agency) violated a 1986 settlement agreement that resolved this reduction-in-grade appeal. Both were dismissed in initial decisions that found the petitions were

untimely filed. The Court of Appeals for the Federal Circuit reversed the timeliness decision in one case (BN-0752-86-0169-M-1) and remanded for adjudication of the appellant's claim. The Board vacated the initial decision in the other case (BN-0752-86-0169-C-2) and remanded both cases for further adjudication. *Fitzpatrick v. Department of Justice*, MSPB Docket Nos. BN-0752-86-0169-M-1 and BN-0752-86-0169-C-2 (June 4, 2002). For the following reasons, the petitions for enforcement are DENIED.

Appellant's request to initiate discovery

In a motion filed on July 26, 2002, the appellant requested a wavier of the 25-day time limit for initiating discovery. *See* 5 C.F.R. § 1201.73(d). For the following reasons, the motion is DENIED. In support of his motion, the appellant argued that the agency had not complied with my June 12, 2002, order to submit the appellant's official personnel file (OPF), that the agency had erroneously characterized a file in its reply brief, and that everyone makes procedural errors.[1] The appellant's arguments are unavailing. There is no regulatory right to discovery in compliance cases, although discovery may be granted by the administrative judge. *See, e.g., Vidal v. U.S. Postal Service*, 84 M.S.P.R. 395,

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[1] The agency limited its response to the "two most recent volumes" of the appellant's OPF. The submission is responsive to the Board's order because the documents appear to be filed in date order and volumes earlier than 1985 would not be expected to be relevant to this proceeding. Moreover, this is the same portion of the file requested by the appellant when he first raised the issue of breach in a letter to the agency. AF-3 tab 5, exhibit 10.

400 (1999); *Thomas* v. *Department of Housing & Urban Development*, 63 M.S.P.R. 649, 663 (1994). The Board may require the presentation of evidence when it is necessary to determine whether an agency has complied. *Id., citing, Williams* v. *Department of the Navy*, 43 M.S.P.R. 114, 117 (1990). In the appellant's case, the Board remand decision required me to direct the agency to submit "all evidence within its control, including the appellant's OPF, that pertain to the compliance issues." The Board, I conclude, has required the agency to submit the necessary evidence, and there is no basis for granting the appellant's request to waive the time limit and permit him to initiate discovery.

Background

On September 8, 1986, the parties entered into a settlement agreement resolving the appellant's reduction-in-grade appeal. The terms of the agreement were:

1. The employee will on this date request a postponement of the hearing (No. BN 07528610169) now pending before the Merit Systems Protection Board (MSPB).

2. The agency will cancel the adverse action taken against the employee on May 27, 1986 and remove from the employee's Official Personnel File (OPF) all references to that action, including, but not limited to: (1) the decision letter of May 27, 1986 imposing the adverse action on the employee; and (2) the Form SF-50 memorializing the adverse action. However, the agency will retain the letter of

March 6, 1986 proposing the adverse action against the employee.

3. The employee will submit a letter requesting a reduction in grade from GM-15 to GS-13/Step 8 and an official transfer from the Boston division to the Providence Resident Agency for personal reasons, effective May 27, 1986.

4. The agency will place a copy of the employee's request letter and a form SF-50 reducing the employee from GM-15 to GS-13/Step 8 in the OPF, stating the reason for the action as "Employee's Request for voluntary Downgrade for Personal Reasons."

5. At the conclusion of a successful six month evaluation period commencing on or about July 7, 1986, the agency will transfer, on a no-cost basis, the employee to the Providence Resident Agency, giving the reason, "For Official Reasons."

6. The employee agrees that he will perform at an Acceptable Level of Competence as determined by the agency's Performance Appraisal System, maintain at least a "Fully Successful" performance level, and comply with the general standards of conduct as set forth in the agency's Manual of Administrative Operations and Procedures.

7. The agency will treat the employee like all other GS-13 Special Agents, providing him all the rights and benefits to which he is entitled. Additionally, the agency acknowledges the

employee's right to exercise his appeal rights before the MSPB or any similar forum, and will not initiate any transfer or adverse personnel action against the employee as a result of his exercise of such rights.

8. The agency agrees that the employee's transfer is not now anticipated, and further, the agency will not effect the transfer of the employee from the Providence Resident Agency absent a loss of effectiveness or extraordinary needs of the Bureau, which are not now foreseen. This agreement remains in force until such time as the employee becomes eligible for early retirement, which is calculated to be March, 1990.

9. The parties agree to reasonably avoid any non-essential disclosure of the terms of this agreement.

10. The parties agree to make the terms of this agreement a part of the administrative record of the Merit Systems Protection Board, Docket No. BN 07528610169.

11. The employee acknowledges and agrees that all Attorney's fees and other costs incurred in connection with this matter will be borne solely by the employee.

12. The parties agree that the above terms and conditions constitute the complete agreement reached by the parties in this matter.

See, e.g., First Compliance File (AF-1) tab 7, exhibit 2.

On August 13, 1999, the appellant filed a petition for enforcement alleging that the agency had violated the agreement because: (1) An Assistant United States Attorney (AUSA) had told a client that he had access to the appellant's personnel file and would use *Giglio* information if the appellant testified[2] and (2)

He had received a letter from the Public Integrity Section of the Department of Justice advising him that he was "demoted" and left the agency under "suspicious circumstances."

On March 5, 2001, the appellant filed another petition for enforcement alleging that the agency violated the agreement by failing to purge "adverse materials" from his official personnel file (OPF). This allegation was based on documents he received from the agency in response to his Freedom of Information/Privacy Act (FOIPA) request and also on an alleged agency admission in a footnote in a September 23, 1999, brief. The footnote states: "In a review of appellant's OPF, several documents from the MSPB hearing in 1986 had been misfiled in the record and in need of removal. The record is currently under review for purging of those materials." AF-1 tab 7, page 6, note 1.

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[2] *Giglio v. United States*, 405 U.S. 150 (1972) (The failure to disclose evidence affecting the credibility of a witness required a new trial).

Legal standard

An appellant alleging breach of a settlement agreement bears the burden of proof. *See Komiskey v. Department of the Army*, 70 M.S.P.R. 607, 609-10 (1996), *aff'd*, 108 F.3d 1394 (Fed. Cir. 1997) (Table). The agency, however, upon the filing of a petition for enforcement alleging breach, must produce evidence of its compliance with the agreement. *Vaughan v. U.S. Postal Service*, 77 M.S.P.R. 541, 546 (1998). If there has been a material breach of the agreement, the non-breaching party has the option of enforcing the terms of the agreement or rescinding the agreement and going forward with the original claim. *Baig v. Department of the Navy*, 66 M.S.P.R. 269, 277 (1995), *aff'd*, 64 F.3d 677 (Fed.Cir.1995) (Table). A material breach is one that relates to a matter of vital importance or goes to the essence of the contract. *Littlejohn v. Department of the Air Force*, 69 M.S.P.R. 59, 62 (1995).

The first petition for enforcement

The appellant alleges that the agency violated paragraph 2 of the agreement that required it to remove from his OPF all references to the adverse action, including, but not limited to the decision letter of May 27, 1986 imposing the adverse action, and the Form SF-50 memorializing the adverse action. The bases for the appellant's allegation of agency breach are: (1) An Assistant United States Attorney (AUSA) told one of the appellant's clients that he had access to the appellant's personnel file and would use *Giglio* information if the appellant testified; and (2) He

received a letter from the Public Integrity Section of the Department of Justice advising him that he was "demoted" and left the agency under "suspicious circumstances."

In 1997 the appellant was "President and CEO" of Investigative Electronic Imaging (IEI) Resources, Inc. He was scheduled to testify for the defense in a criminal matter. The defense attorney told the appellant that when he identified him as a defense witness to AUSA John J. Falvey, Falvey stated that he would impeach the appellant using information from his agency personnel file. On September 18, 1997, the appellant filed a complaint about AUSA Falvey's conduct with the United States Attorneys Office in Boston. AF-1 tab 6, attachment. He attached an unsigned affidavit from the defense attorney. According to the affidavit, AUSA Falvey "made a comment regarding his having access to Mr. Fitzpatrick's personnel file from the Federal Bureau of Investigation, and further, implied that he had reviewed it." *Id.*

In a letter dated December 14, 1997, AUSA Falvey explained that the appellant had submitted a resume in which he claimed to have set up the ABSCAM undercover operation. He showed this to Special Agent (SA) Russ Chisholm who commented that the appellant had overstated his contribution to ABSCAM and had left the agency after a demotion. On September 12, 1997, AUSA Falvey wrote a letter to the agency in Boston requesting information about the appellant's credentials and information that might reflect on his credibility that could be disclosed in open court. Remand Appeal File (AF-

3) tab 5, exhibit 7. Boston responded with basic information concerning the appellant's employment and with the information that he "voluntarily stepped down from the position of Assistant Special Agent in Charge (GM-15) to position of Special Agent (GS-13) for personal reasons, and resigned on December 2, 1986." Boston added that if the appellant were still on the agency's roles, "there would be *Giglio* related issues in utilizing him as a witness." AF-3 tab 5, exhibit 8. In court on September 16, 1997, AUSA Falvey asked the defendant's attorney if he needed to get the appellant's file so he would be prepared to impeach him. He added, "I hear it's a thick one." According to AUSA Falvey, he had not really seen the appellant's file and did not obtain it because he found other grounds for cross-examining the appellant. AF-3 tab 5, exhibit 7.

As an initial matter, I note that paragraph 2 of the settlement agreement specifically provides that "the agency will retain the letter of March 6, 1986 proposing the adverse action against the employee." Thus If AUSA Falvey had reviewed the appellant's OPF, he could have seen the proposal notice, and arguably under the settlement agreement he could have used it for impeachment purposes.[3] The information disclosed to AUSA Falvey by SA Chisholm and by the Boston office was accurate, i.e., the appellant was voluntarily demoted and later resigned from the agency. Boston also stated that there would be *Giglio* related issues in utilizing the appellant as a

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[3] The parties agreed only to "reasonably avoid any non-essential disclosure of the terms." Settlement agreement, paragraph 9.

witness" if he were still on the agency's roles. There is no evidence to suggest what these issues were and no basis for concluding that they relied on references to the adverse action that were required by the settlement agreement to be removed from the appellant's OPF. In reaching this conclusion, I have considered that (AUSA Falvey ultimately found other grounds to cross-examine the appellant, and the defendant's attorney withdrew him as a witness.[4] This suggests the possibility of *Giglio* issues unrelated to the contents of the appellant's OPF. Finally, AUSA Falvey has admitted that he made a remark about impeaching the appellant substantially the same as the remark reported by the defense attorney. At the same time, however, he denied that he actually saw the appellant's OPF, and the defense attorney's statement (AUSA Falvey "implied" that he had reviewed the file) is not evidence to the contrary. The appellant, I conclude, has not shown that AUSA Falvey's statement is evidence that the agency breached the settlement agreement by failing to remove references to the adverse action from his OPF.

The appellant's complaint about AUSA Falvey was forwarded to the agency's Office of Professional Responsibility. AF-1 tab 6, attachment. That office apparently concluded that AUSA Falvey committed no misconduct. In a response advising the appellant that there was no procedure for appealing that finding, Candace Will, Assistant Counsel, noted that an attachment

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[4] According to AUSA Falvey, the appellant had overstated his contribution to the ABSCAM investigation and lacked any basis for testifying about the qualifications of the government's expert witnesses because the team on which they worked did not exist when the appellant left the agency. AF-3 tab 5, exhibit 7.

to one of the appellant's letters suggested that he was "displeased about the FBI's decision that [he] could be impeached about [his] demotion and ultimate departure from the FBI," and she reminded him that the FBI had its own Office of Professional Responsibility for complaints against its personnel. *Id.* In his July 9, 1999, response, the appellant stated that Will's "declaration that [he] was demoted and left the Bureau under less than honorable conditions is false," and "hits at the essence of the *Giglio* inferences made by AUSA [Falvey]." In his enforcement petition; the appellant alleges that Will's statement is evidence that the agency has violated paragraph 2 of the settlement agreement by not removing all references to the adverse action from his OPF. Again, paragraph 2 of the settlement specifically provided that the agency would retain the proposal notice. Therefore, if Ms. Will had reviewed the appellant's OPF before she prepared her response to the appellant, under the terms of the agreement she could have seen the notice proposing to reduce the appellant in grade. In any event, Ms. Will's statement referred only to the appellant's demotion and ultimate departure from the agency. Her response was accurate, i.e., appellant was voluntarily demoted and he left the agency by resignation. Ms. Will's statement does not imply, as the appellant has suggested, that he left the agency "under less than honorable conditions" or under "suspicious circumstances." The appellant, I conclude, has not shown that Ms. Will's statement is evidence that the agency breached the settlement agreement by failing to remove references to the adverse action from his OPF.

The second petition for enforcement

The appellant filed a second petition for enforcement again alleging that the agency violated paragraph 2 of the agreement by failing to remove all references to the adverse action from his OPF. This allegation was based on documents he received from the agency in response to his Freedom of Information/Privacy Act (FOIPA) request and also on an, alleged agency admission in a footnote in a September 23, 1999, brief. The footnote states: "In a review of appellant's OPF, several documents from the MSPB hearing in 1986 had been misfiled in the record and in need of removal. The record is currently under review for purging of those materials." AF-1 tab 7, page 6, note 1.

In paragraph 2 of the agreement, the agency was required to remove "all references" to the canceled adverse action from the appellant's OPF. If the agency misfiled documents from the hearing that referred to the canceled adverse action in the appellant's OPF, those documents could have violated the agreement. The appellant has not shown or even alleged that the misfiled documents contained references to the canceled adverse action, and despite steps taken to identify the documents, the agency was unable to obtain copies of them. AF-3, tab 5, exhibit 18. The current copy of the appellant's OPF submitted in response to the Board's remand order contains no misfiled documents that would violate the settlement agreement. Because there is no evidence of what documents from the MSPB hearing were found in the appellant's OPF, there is no basis for a conclusion that they referred to

the canceled adverse action in violation of the agreement.

Finally, the appellant alleges that the agency violated the settlement agreement by failing to purge documents from his OPF as evidenced by documents he received on February 6, 2001, in response to an FOIPA request. In order to show that the agency violated the settlement, the appellant would have to prove that the documents he received from the agency: (1) referred to the canceled adverse action; and (2) were in his OPF. The appellant did not limit his FOIPA request to documents contained in his OPF. Second Compliance File (AF-2) tab 10, subtab 16. The agency response to the FOIPA request indicated that the documents were produced after review of "Headquarters and Boston Field Office files." AF-2 tab, 14, exhibit 2. Finally, the settlement agreement did not require the agency to remove documents or references to the canceled adverse action from any files other than the OPF. For these reasons, I conclude that the appellant has not shown that the documents he received on February 6, 2001, in response to his FOIPA request were located in his OPF in violation of the settlement agreement. In reaching this conclusion, I have considered that the June 13, 1986, memorandum, the June 14, 1986, notice, and the standard forms 50 are stamped either "67-not recorded" or "removed from field personnel file, 67-not recorded." AF-2 tab 1, attachments and tab 10, subtab 19. According to the agency's brief, a "67" prefix indicates personnel files including but not limited to an employee's OPF. The stamped notation on these

documents therefore casts further doubt on whether they were filed in the appellant's OPF.

The alleged breach was not material

In *Herring v. Department of the Navy*, 90 M.S.P.R. 165, 169-70 (2001), the Board considered whether the agency had breached a settlement agreement that required it to "remove all references from the appellant's Official Personnel Folder to the charges which form the basis for the underlying removal action" by failing to correct documents before the Office of Personnel Management to show that the appellant had resigned. The Board found that it did not need to reach that question because any agency breach was not material. The Board looked at the goal of the settlement agreement and concluded that it was to purge adverse information from the records that might affect future employment prospects, and to correct information that might affect the award of disability benefits. The Board concluded that any agency breach was not material because there was no evidence that the breach affected the employee's future employment prospects or harmed his entitlement to disability benefits.

The appellant in this case appealed an action taken under 5 U.S.C. chapter 75 reducing him in grade from GM-15 Assistant Special Agent in Charge to GS-13 Special Agent in Boston. He entered into a settlement agreement that canceled that reduction in grade and substituted a voluntary reduction in grade and reassignment to Providence. The agreement provided that the agency would remove "all references" to the

adverse action from the appellant's OPF, but it also provided that the agency would "retain the letter of March 6, 1986 proposing adverse action against the employee." Unlike *Herring*, the goal of the appellant's settlement agreement could not have been to purge adverse information from the records that might affect future employment prospects because the appellant remained an agency employee and because the agreement specifically allowed the agency to retain the notice of proposed reduction in grade describing the charges against the appellant. Similarly, the goal of the agreement could not have been to protect the appellant from impeachment as a defense witness because the appellant remained an agency employee and could not have anticipated he would serve as a defense witness. It is more likely that the goal of the agreement when it was reached was to minimize the damage to the appellant's agency career that a record of an adverse action would have caused and allow him to start over in a location he preferred. This conclusion is consistent with the appellant's affidavit in which he states that the "fundamental purpose" of the agreement was to "end the underlying dispute, erase it from my life insofar as possible, and proceed into a new phase of my professional life."[5] AF-3, tab 3. Because the

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[5] I have not overlooked the appellant's statement in a later affidavit that he also wished to protect future employment prospects and his reputation in general. AF-3 tab 9, exhibit 2. While this may have been a "broader concern," because neither the adverse action nor the settlement agreement contemplated the appellant's separation from the agency, I do not find it reasonable to believe that protection of future employment prospects and his reputation in general was a specific goal of the settlement agreement.

appellant resigned from the agency on December 1, 1986, the alleged agency breach of the agreement in 1997 did not affect his agency career. Therefore, any agency breach was not material.

Retaliation

In its remand decision, the Board noted that claims of reprisal may properly be raised in a petition for enforcement to show that the agency breached a settlement agreement by acting in bad faith. *See Kuykendall v. Department of Veterans Affairs*, 68 M.S.P.R. 314, 322 (1995). The Board concluded that the appellant in this case has not made such a claim. At the same time, the Board remanded the case with instructions to "afford the appellant the opportunity to raise instances of alleged agency noncompliance with the settlement agreement that are within the Board's jurisdiction." It is unclear whether these instructions permit the appellant to raise a new claim of bad faith.

If so, the appellant now alleges that the Boston office where he worked was "corrupt," and the appellant bargained for settlement terms that would allow him to escape the corruption. The agency knew or should have known that the Providence office was also "corrupt." Therefore, the agency acted in bad faith and breached the settlement agreement when it agreed to transfer him to another "corrupt" office. Moreover, as a public employee he had a right to a job unaffected by known corruption.

In *Kuykendall*, the Board held that a party may breach a settlement agreement by acting in bad faith with respect to a settlement term, and the appellant may establish that the agency breached the settlement agreement by showing that the agency's retaliatory/harassing actions constituted bad-faith noncompliance with the reinstatement term. *Id.* at 323-24. To establish a breach of the settlement agreement based on this implied covenant of good faith, however, it is the appellant's burden to show that the agency's proven retaliatory/harassing actions, under the totality of the circumstances, amounted to an unjustified and substantial deprivation of his rights as an incumbent of the position in question. *Id.* at 325.

The appellant appears to allege that the agency negotiated with him in bad faith because it knew or should have known that he wanted to leave a corrupt office and it agreed to a provision that reassigned him to another corrupt office. An allegation that the agency negotiated the agreement in bad faith is a challenge to the validity of the agreement, not an allegation that the agency breached the settlement agreement by engaging in retaliatory/harassing actions after the agreement was reached. A party may challenge the validity of a settlement agreement if the party believes that the agreement is unlawful, involuntary, or the result of fraud or mutual mistake. *Wade v. Department of Veterans Affairs*, 61 M.S.P.R. 580, 583 (1994). Because the appellant has not claimed that the agreement was invalid and because his allegation of bad faith does not state a claim of agency retaliation or

harassment, I find no merit to the allegation of bad faith.

DECISION

The appellant's petitions for enforcement are DENIED.

FOR THE BOARD:

/s/
Elizabeth B. Bogle
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on SEP 10 2002, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a . . .

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBERS
BN-0752-86-0169-B-1
BN-0752-86-0169-M-1

ROBERT FITZPATRICK,

Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: August 12, 2002

A. Douglas Matthews, Esquire, Fall River, Massachusetts, for the appellant.

Mindy A. Kaiden, Esquire, Washington, D.C., for the agency.

BEFORE

Susanne T. Marshall, Chairman
Neil A. G. McPhie, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or

when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that

normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

/s/
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

APPENDIX E

STATEMENT OF FACTS

The Settlement Agreement whose alleged breaches are the subject of petitioner's filings with the Merit Systems Protection Board (MSPB) is set forth on pp. 3 and 4 of the AJ's decision as well as in the detailed analysis at pp. 10-15 of this brief.

I. Background

1. The allegations underlying the original filings which led to the Settlement Agreement was set forth in the Statement of Facts of the first appeal to this Court (00-338), which resulted in the remand (Decision A39) and is included in the Appendix at pp. 41-50, with underlying citations to the current Appendix.

2. In summary, with reference to the original Statement of Facts: A. Fitzpatrick was a 21-year veteran of the FBI who was Assistant Special Agent in Charge (ASAC) at the Boston Bureau of the FBI from 1981 to 1986. (Statement, ¶1, A41).

B. In 1985, he received credible information that his superior, the Special Agent in Charge (SAC) of the Boston Bureau, had disclosed Grand Jury information regarding the identity of an informant to a mob lawyer (Statement, ¶3, A41) with polygraphic confirmation at A56.

C. Said informant subsequently disappeared and was assumed murdered. The body of the informant in question was finally located and dug

up by authorities on January 14th, 2000. (Statement, ¶4, A42).

D. After receiving this information concerning the SAC, a Fitzpatrick contacted the office of the Director of the FBI to report same. (Statement, ¶5, A42; polygraphic confirmation, question 2, A56.

E. Fitzpatrick never received a responsive communication. (Statement, ¶6, A42; polygraphic confirmation question 3, A56).

F. Within several months of Fitzpatrick's reporting of the leak, the SAC in question filed a complaint against Fitzpatrick for short-cutting procedures in connection with his investigation of an incident on Cape Cod in which an agent had (harmlessly) fired his gun during a major drug apprehension. This complaint was the subject of the 1986 case. Petitioner made an Offer of Proof at the Board dated October 11, 1999, that: (1) The SAC had ordered Fitzpatrick to conduct the investigation in possible violation of FBI, rules and regulations; (2) The charges complaint of were rarely invoked; and (3) But for Fitzpatrick's reporting of the SAC, the complaint would not have been filed. (Offer of Proof, ¶7-7a-c, A52). The original offer was later verified by Affidavit of Fitzpatrick. A59a.

G. The SAC in question subsequently told Fitzpatrick that the complaint the SAC had filed against Fitzpatrick could be mitigated if Fitzpatrick dropped the complaint he had filed against the SAC. (Offer, ¶8 A52; polygraphic confirmation, Ex. OP2, Ques. 1, A58)

H. As a result of the filing of the complaint by the SAC against Fitzpatrick, he was removed as ASAC, demoted two grades from GM-15 to GS-13; and in June, 1986, he appealed to the MSPB. A63.

G. On Sept. 8, 1986, a Settlement Agreement was reached. A 19

H. Fitzpatrick finally resigned from the FBI on Dec. 1, 1986, after his transfer to Providence (A66) "because of the circumstances caused by the Boston SAC's retaliation against him." (Polygraphic confirmation, Offer, Ex. OP2, Ques. 2, A.-58)

I. After his departure from the FBI, Fitzpatrick became a licensed private investigator, often working for defense counsel at the federal bar. The ultimate filing of the MSPB case was precipitated by information received by Fitzpatrick in 1997, over a decade later, that the prosecution was threatening to impeach him with information from his Official Personnel File (OPF) in a United States District Court criminal sentencing proceeding in Boston in which Fitzpatrick was to testify for the defense.[1] Further

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[1] The exact circumstances are in some dispute, but the best case for the agency was stated by the AUSA in question, who admitted that in courtroom discussion in front of Fitzpatrick's client, "I recall that I asked [the client's lawyer] whether I really had to get Fitzpatrick's file so that I could be prepared to impeach him, and added 'I hear it's a thick one.'" (Letter of AUSA John J. Falvey, Jr., to DOJ OPF, December 14, 1997, A84). Falvey had requested impeachment information from Washington but says he only received information the next day. That written information included the statement that "were Fitzpatrick still on the roles of the FBI, there is indication that there would be Giglio related

investigation by Fitzpatrick let him reasonably to believe that his OPF still contained information forbidden by the MSPB settlement agreement. (Pro se pleading of Fitzpatrick, denominated "Order to Show Cause," A67 -69)

J. The 2001 decision of this court ruled that in Fitzpatrick's course of action, in first proceeding with a Justice Department Office of Professional Responsibility complaint and an attempt to clarify the facts of the matter by communication with the Director of the FBI was a reasonable course of action to determine whether or not that had been improper disclosures, and that he filed at the MSPB within a reasonable amount of time after determining his efforts to determine whether or not that had been a breach had been futile. A39-40

II. New Facts Adduced Upon Remand

3. In its Response to the original 1999 petition, the FBI specifically admitted (via footnote) that it had not ever entered into, nor was in, compliance with that provision of the Settlement Agreement requiring the removal of "all references to" the then-pending adverse action because "several documents from the MSPB hearing had been mis-

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issues in utilizing him as a witness." (Memo of Boston FBI ASAC Richard Watson, 9/17/97, A87) (The apparent reference is to government disclosure requirements mandated by the line of cases stemming from Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972)) This brief argues that in the circumstances, particularly because of the harm to Fitzpatrick, this is a constructive violation of ¶9, even if unwitting. Additionally, the release of the file with the Giglio comment seems to have been a violation of 5 U.S.C. § 552a, the Privacy Act.

filed in the record and in need of removal." (Agency Brief, p. 6, footnote 1, A 78).

4. The agency removed some items from the file in 1999, but bureau counsel admits that it is "unable to state which documents are misfiled." (Agency Counsel Affidavit, July 10th, 2002, ¶'s 3, 4, A 78A, 78B).

5. Additionally, the OPF, as it stood some time after March 30, 2000,[2] "included documents that appeared to originate from the field personnel file, including some that arguably referred to the adverse action." (Sworn Declaration, July 10th, 2002, ¶ 7, A 78B).

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[2] This date is inferred because of the letter of March 30, 2000, of Patrick W. Kelley, Deputy General Counsel of the FBI, informing Fitzpatrick that his FOIA request for his file had been intentionally delayed because "we believed it was inappropriate to take further action on this matter until after the administrative judge issued her decision." A62

APPENDIX F

SUMMARY OF ARGUMENT

This brief argues that the decision of AJ, as adopted as final by the Board, erred as a matter of law because:

A. With respect to the existence of a breach:

1. Fitzpatrick put forward (through the admissions of agency counsel) sufficient prima facie evidence of breach to require that the burden of proof on failure to purge be shifted to the agency, which the AJ refused to do.

2. In any event, the total, unreconstructable scrambling of the file by the agency estops it from asserting the absence of breach, which the AJ refused to rule. It cannot produce evidence of its compliance with the agreement, which it is required to do.

B. With respect to the materiality of the breach:

(1) that the purging provision must be material because it is the sole legal consideration received by Fitzpatrick under the agreement (transfers not being a proper consideration therein);

(2) the purging provisions were in any event material under both the King[1] analysis, the Restatement of Contracts, plus their manifest and continuing importance to Fitzpatrick as can be

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[1] King v. Department of Navy, 130 F.3rd 1031 (Fed.Cir. 1997)

seen by the damage caused to him a decade later merely by reference to his "thick file."

C. As a matter of public policy, all doubts that may exist as to breach and materiality should be resolved in Fitzpatrick's favor so as to take advantage of the potential opportunity adduce evidence of serious corruption in government and particularly in law enforcement agencies.

ARGUMENT

I. Once Fitzpatrick Established His Prima Facie Case, The Administrative Judge Erred in Failing to Shift the Burden of Proof on Breach to the Agency.

While it is true that the initial burden of a petitioner employee seeking to establish a breach of contract is to put forward prima facie evidence of breach, it is also true that after the presentation of prima facie evidence of a breach, the burden shifts to the respondent employer. Herring v. Department of the Navy, 90 M.S.P.R. 165, 168 (2001). An agency must establish compliance with a final order. Popichak v. U.S. Postal Service, 88 M.S.P.R. 623 (2001).

The lower court failed to do so even though agency admissions explicitly satisfied Fitzpatrick's initial burden. Specifically, in pleadings referred to in the Statement of Facts agency counsel admitted that in 1999 documents were "in need of removal" from the file and that the agency is not "able to state which documents were misfiled." (Statement of Facts, ¶'s 3 and 4).

Ignoring these admissions, the AJ assert that "Because there is no . . .

APPENDIX G

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE
DOCKET # BN-0752-86-0169-C-1

ROBERT FITZPATRICK, Appellant, v. U.S. DEPT. OF JUSTICE, Agency	) APPELLANT'S FIRST) OFFER OF PROOF

In furtherance of his Application for Enforcement, as in force or amended, and of any related discovery requests, Appellant Robert Fitzpatrick ("Fitzpatrick") hereby submits the following First Offer of Proof.

Those paragraphs which are asterisked(*) represent allegations which have been the subject of polygraph examinations of Fitzpatrick conducted October 6, 1999. Copies thereof are attached hereto as Exhibits "OP1" and "OP2."

1. Fitzpatrick is an honorably discharged veteran of the armed forces of the United States.

2. On or about September 27, 1965, Fitzpatrick joined the FBI and accrued approximately 21 years of creditable service as of his resignation in 1986.

3. Prior to his resignation, Fitzpatrick had attained the rank of GM-15 and was serving as Assistant Special Agent in Charge ("ASAC") of the Boston Bureau of the FBI.

4. In 1985, Fitzpatrick received credible information that his superior, the Special Agent in Charge ("SAC") of the Boston Bureau of the FBI, had leaked "6E" grand jury information to a criminal defense lawyer (regarding the identity of an informant).

4a. Said informant subsequently disappeared and is presumed murdered.

*5. After receiving this information concerning the SAC, Fitzpatrick contacted the Director's office of the FBI orally and in writing to report same.

*6. Fitzpatrick was never subsequently contacted by the FBI Office of Professional Responsibility or anyone from the Director's office regarding the leak information he transmitted.

7. Subsequent to Fitzpatrick's reporting of the leak, the SAC in question filed a complaint against Fitzpatrick regarding Fitzpatrick's investigation of an incident on Cape Cod where an agent had fired his gun during a major drug apprehension.

7a. The SAC had ordered Fitzpatrick to conduct the investigation in violation of FBI rules and regulations.

7b. The charges complained of were rarely invoked.

7c. But for Fitzpatrick's reporting of the SAC, the complaint would not have been filed.

*8. The SAC in question subsequently told Fitzpatrick that the complaint the SAC had filed against him could be mitigated if Fitzpatrick dropped the complaint against the SAC.

9. Fitzpatrick refused to alter his position.

10. The matter ultimately came before the Merit System Protection Board ("MSPB") and a settlement agreement was entered into.

11. As of September, 1999, the FBI was in breach of the Settlement Agreement reached in the MSPB case and appears to have so been since the signing of the agreement in 1986. (The full extent and nature of the breach or breaches are not known at this time.)

*12. Fitzpatrick shortly thereafter resigned from the FBI in 1986, forfeiting pension rights, because of the circumstances caused by the SAC's retaliation against him.

/s/

A. Douglas Matthews
25 Norwood St., #300
Fall River, MA 02723
(508) 675-4599
Fax: 673-4632

October 9, 1999

CERTIFICATE OF SERVICE

I, A. Douglas Matthews, representing Appellant in this action, hereby certify that I gave Christopher R. Donovan, Counsel for Appellee, a copy of the foregoing APPELLANT'S FIRST OFFER OF PROOF on the date and at the address below listed by:

Employment Law Unit II
Office of General Counsel, Room 7947
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

/s/
A. Douglas Matthews
25 Norwood St., #300
Fall River, MA 02723
(508) 675-4599
Fax: 673-4632

October 11, 1999

APPENDIX G(A)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE
DOCKET # BN-0752-86-0169-C-1

ROBERT FITZPATRICK, Appellant, v. U.S. DEPT. OF JUSTICE, Agency	) APPELLANT'S) VERIFICATION) OF OFFER OF) PROOF

I, ROBERT FITZPATRICK, Appellant in the above-entitled action, do hereby swear under the pains and penalties of perjury that Paragraphs 1, 2, 3, 4, 4a, 5, 6, 7, 7a, 7b, 8, 9, 10, and 12 of the APPELLANT'S FIRST OFFER OF PROOF, previously filed with this Court in this matter, are true to the best of my knowledge and memory. While Paragraph 7c is a conclusion, I further swear under the pains and penalties of perjury that I am absolutely morally certain based on my expertise in employer custom, practice and procedure acquired during my 21 years of experience as a Special Agent and later as an Assistant Special Agent in Charge and my familiarity with the totality of the circumstances involved in the situation in question that Par. 7c is also true. It is noted that the accuracy of Par. 11 is a matter of record.

Sworn under the pains and penalties of perjury as of date hereunder.

/s/_____
ROBERT FITZPATRICK

DATE: 10/29/99

APPENDIX G(B)

COUNSEL'S NOTES ON POLYGRAPH EXHIBITS TO APPELLANT'S FIRST OFFER OF PROOF

At counsel's request, Appellant submitted to polygraphic examination, per attached reports labeled "OP1" and "OP2." The 5 questions in the "examination were divided into two reports by the operator because 4 questions are the maximum it is customary to put on one report. There were no unreported questions asked.

Counsel submits that polygraph evidence is particularly appropriate when the allegations made are serious and/or there is relatively little other physical evidence to support what will probably be contested allegations. Polygraphs present otherwise undetectable "demeanor evidence" consisting of biological bodily phenomena attendant to the stress involved in lying.

The operator, John Nasuti, is former senior polygrapher of the Massachusetts State Police. If there are any questions, he can be contacted at (508) 883-2758.

/s/

A. Douglas Matthews
25 Norwood St., #300
Fall River, MA 02723
(508) 675-4599
Fax: 673-4632

Date: October 9, 1999

EXHIBITS
"OP1" AND "OP2"

Ex. "OP1" p. 1

TRUTH DETECTION LABORATORIES, INC.

October 6, 1999

TO: ATTORNEY DOUGLAS MATHEWS

FROM: JACK NASUTI: SENIOR POLYGRAPH EXAMINER

SUBJECT: POLYGRAPH EXAMINATION

Re: Robert Fitzpatrick

Dear Attorney Mathews:

On October 6, 1999 a polygraph examination was extended to the above captioned individual. The purpose of the exam was to determine whether the polygraph technique could be employed to support the statements of the above referenced individual regarding drug investigative information that was leaked to a defense lawyer (former Strike Force Attorney), by a Superior FBI Agent (SAC) named, James Greenleaf. A series of polygraph tests followed the pre-operational interview with him. The interview established a rapport and also clarified those questions that were to be put to Mr. Fitzpatrick. The Backster Zone Comparison Test Format was employed. A Stoelting Ultrascribe four (4) pen polygraph was used. This instrument renders a permanent graph of three phenomena peculiar to polygraph. The following relevant questions were asked

during the tests administered to him. His answers follow each question.

1. In 1985, did you receive credible information that 6E information had been leaked to a criminal defense lawyer by the Boston SAC, James Greenleaf?

ANSWER: YES

2. After receiving the information concerning James Greenleaf, did you contact the Directors office of the FBI by phone and mail to report this information?

ANSWER: YES

3. Did OPR ever interview you regarding Greenleaf's criminality?

ANSWER: NO

Suite 405, 21 McGrath Highway, Quincy, Massachusetts 02169 (617) 282-5198

Ex. "OP1" p. 2

TRUTH
DETECTION
LABORATORIES, INC.

October 6, 1999

TO: Attorney DOUGLAS MATHEWS

FROM: JACK NASUTI: Senior Polygraph Examiner

SUBJECT: Results of polygraph examination administered to: Robert Fitzpatrick

A careful review of the Backster Zone of Comparison polygraph charts which resulted and using a numerical three point scale, leads this examiner to the following conclusions:

Reactions indicative of truth were recorded during the tests to questions:

#1
#2
#3

The polygraph technique is supportive of the testee. If you have any further questions regarding this matter, please contact me at the following phone no., 508-883-2758.

Sincerely yours,

/s/
Jack Nasuti

Senior Polygraph Examiner

Suite 405, 21 McGrath Highway, Quincy,
Massachusetts 02169 (617) 282-5198

Ex. "OP2" p. 1

TRUTH DETECTION
LABORATORIES, INC.

October 6, 1999

TO: ATTORNEY DOUGLAS MATHEWS

FROM: JACK NASUTI: SENIOR POLYGRAPH EXAMINER

SUBJECT: POLYGRAPH EXAMINATION

Re: Robert Fitzpatrick

Dear Attorney Mathews:

On October 6, 1999 a polygraph examination was extended to the above captioned individual. The purpose of the exam was to determine whether the polygraph technique could be employed to support the statements of the above referenced individual regarding drug investigative information that was leaked to a defense lawyer (former Strike Force Attorney), by a Superior FBI Agent (SAC) named, James Greenleaf. A series of polygraph tests followed the pre-operational interview with him. The interview established a rapport and also clarified those questions that were to be put to Mr. Fitzpatrick. The Backster Zone Comparison Test Format was employed. A Stoelting Ultrascribe four (4) pen polygraph was used. This instrument renders a permanent graph of three phenomena peculiar to polygraph. The following relevant questions were asked

during the tests administered to him. His answers follow each question.

1. Did James Greenleaf, your Boston SAC, tell you that the complaint he filed against you could be mitigated if you dropped the complaint against him?

ANSWER: YES

2. In 1986, did you resign because of the circumstances caused by the Boston SAC's retaliation against you?

ANSWER: YES

Suite 405, 21 McGrath Highway, Quincy,
Massachusetts 02169 (617) 282-5198

Ex. "OP2" p. 2

TRUTH DETECTION
LABORATORIES, INC.

October 6, 1999

TO: Attorney DOUGLAS MATHEWS

FROM: JACK NASUTI: Senior Polygraph Examiner

SUBJECT: Results of polygraph examination administered to: Robert Fitzpatrick

A careful review of the Backster Zone of Comparison polygraph charts which resulted and using a numerical three point scale, leads this examiner to the following conclusions:

Reactions indicative of truth were recorded during the tests to questions:

#1
#2

The polygraph technique is supportive of the testee. If you have any further questions regarding this matter, please contact me at the following phone no., 508-883-2758.

Sincerely yours,

/s/
Jack Nasuti

Senior Polygraph Examiner

Suite 405, 21 McGrath Highway, Quincy,
Massachusetts 02169 (617) 282-5198

APPENDIX H

. . . Agency breached the agreement by failing to purge the file of the information surrounding the adverse action. However, as is evidenced by the SF-50 in the record, the letter from appellant to the FBI requesting a reduction in grade "for personal reasons," and the declaration of Agency Counsel (Attached hereto as Exhibit 9), the FBI did make the required modifications of the file as was agreed to in the settlement agreement.[1] He cites to Mr. Potter's unsigned affidavit to assert that AUSA Falvey had seen his file and that it had materials in it that would allow for impeachment. Mr. Potter's affidavit does not even make such assertions. It only indicates that AUSA Falvey confirmed with Potters that he intended to call Fitzpatrick since he was preparing for impeachment and that Falvey "implied" he had access to the file and had reviewed it. However, all evidence indicates that AUSA Falvey never saw any part of appellant's file and that his only access was the basic information received verbally from the FBI Field Office in Boston. Exhibit 5.

Additionally, AUSA Falvey's only information regarding the proposed adverse action against appellant was received through the comment of the FBI case agent who merely said he had heard that appellant had been demoted and resigned from the FBI. Therefore, no evidence of either

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[1] In a review of appellant's OPF, several documents from the MSPB hearing in 1986 had been misfiled in the record and in need of removal. The record is currently under review for purging of those materials.

failure to purge the OPF or of improper disclosure of settlement matters has been presented. . . .